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**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

JESUS X. MIRAMONTES,  
individually, and as a representatives of  
the class,  
  
Plaintiffs,  
vs.  
U.S. HEALTHWORKS, INC.; and  
DOES 1-10 inclusive,  
 ) CASE No.: 2:15-CV-05689-SJO-AFM  
 )  
 ) MOTION FOR PRELIMINARY  
 ) APPROVAL  
 )  
 ) Judge: Hon. S. James Otero  
 )  
 ) Hearing Date: October 24, 2016  
 ) Time: 10:00 a.m.  
 ) Location: Courtroom 1, Spring Street

Now come the Plaintiff, by and through counsel hereby move the Court pursuant to Federal Rule of Civil Procedure 23 for preliminary approval of the class settlement, certification of a class for the purposes of settlement, and approval of form and manner of notice. The Plaintiff seeks an Order:

- 1) Conditionally certifying a Settlement Class comprised of the Settlement  
2 Class Members;
- 3) Preliminarily approving the Settlement Agreement and Release;
- 4) Approving the proposed Notices of Class Action Settlement;
- 5) Certifying Plaintiff Jesus X. Miramontes as Class Representatives;
- 6) Appointing Plaintiff's counsel as Class Counsel; and
- 7) Appointing a Settlement Administrator;

8 A memorandum in support is attached hereto and incorporated herein.

9  
10 Respectfully submitted.

11 DATED: September 24, 2016

12 DEVIN H. FOK ESQ.

13 DHF LAW, P.C.

14 By: /s/ Devin H. Fok

15 Devin H. Fok

16 Attorney for Plaintiff

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## **MEMORANDUM OF POINTS AND AUTHORITIES**

## I. INTRODUCTION

Plaintiff Jesus X. Miramontes, individually and on behalf of the Settlement Class seeks preliminary approval of the proposed Settlement Agreement with Defendant U.S. Healthworks, Inc. (“Defendant” or “USHW”). Plaintiff alleges various state and federal statutory violations in connection with Defendant’s procurement of employment background check reports<sup>1</sup> and its systematic failure to provide notices in the form and manner that is compliant with the FCRA (Fair Credit Reporting Act, 15 U.S.C. §1681 *et seq*) and the CCRAA (California Consumer Credit Reporting Agencies Act, Civ. C. §1785 *et seq.*).

Specifically, Defendant failed to provide a stand-alone disclosure consisting solely of the disclosure that “a consumer report will be procured for employment purposes” in violation of 15 U.S.C. §1681b(b)(2)(A)(i). Defendant also failed to provide consumers with a copy of their report and a reasonable opportunity to dispute the information *before* taking adverse action in whole or in part of the basis of the report. 15 U.S.C. §1681b(b)(3)(A).

Moreover, Defendant procured not only criminal history reports but also employment credit reports. In California, this practice was made illegal on January 1, 2012 under Lab. C. §1024.5. Although there are some limited exceptions, Plaintiff alleges that none of the positions offered by Defendant during the relevant class period fell within one of these enumerated categories. *See* Lab. C. §1024.5(a)(1)-(8).

Moreover, even if Defendant can successfully argue that all of the employment credit reports it procured during the relevant class period fell within the exceptions, it

<sup>1</sup> They are defined as “consumer reports” within the meaning of the Fair Credit Reporting Act (“FCRA” 15 U.S.C. §1681 *et seq.*). See Definition at 15 U.S.C. §1681a(d).

1 violated the CCRAA by failing to provide the required disclosure prior to procuring  
2 said credit reports. *See Civ. C. §1785.20.5.*

3 During the relevant time period, Defendant utilized a single vendor, ADP, Inc.  
4 to procure employment background check reports and furnish notices to job  
5 applicants. ADP, Inc. used the same notices and procurement procedures for all of  
6 Defendant's job applicants. Plaintiff has discovered no variations in its practices with  
7 respect to individual job applicants. Accordingly, Plaintiff believes that this action is  
8 suitable for class settlement.

9 The Settlement Agreement between Plaintiff and Defendant (collectively, the  
10 "parties"), if approved, will resolve all claims of the Plaintiffs and all members of the  
11 class in exchange for Defendant's agreement to pay \$400,000 into a common  
12 settlement fund. Declaration of Devin H. Fok ("Fok Decl.") Ex. 1, Stipulation and  
13 Settlement of Class Action Claims ("SA"), P.3, ¶I.1.13. The settlement is a ***claims-***  
14 ***paid*** process involving no reversion. SA, P. 7, ¶III.K. The class size is approximately  
15 4,381 members. SA, P. 15, ¶IX.9.1 However, in the event that the class size exceeds  
16 4,500, Plaintiff will have the option to terminate the settlement. SA, P.23, ¶XI.11.2.

17 The identity of the class members are ascertainable and have been identified by  
18 Defendant. The proposed settlement of this action is the product of hard-fought and  
19 lengthy arm's-length negotiations by experienced and informed counsel, and warrants  
20 preliminary approval, as the terms are "fair, reasonable, and adequate." Fed. R. Civ.  
21 P. 23(e)(2).

22

23 **II. PLAINTIFF'S CLAIMS**

24

25 On June 5, 2014 Plaintiff was extended a written offer of employment by  
26 Defendant to work as a medical assistant. Fok Decl., Ex. 2. On June 10, 2014,  
27 Defendant procured an employment background check report containing information

related to his credit and criminal history<sup>2</sup>. Fok Decl., Ex. 3. The report disclosed various pieces of adverse credit and criminal history information. Based on the information disclosed in the report, Defendant rescinded its job offer.

However, Defendant never provided Plaintiff with a copy of his consumer report before the revocation of his employment offer. It was not until after his attorneys made a formal request did Plaintiff ultimately receive a copy of his consumer report. Plaintiff alleges that a medical assistant position does not fall within any of the enumerated positions for which a credit report may be procured. *See Lab. C. §1024.5(a)(1)-(8)*. Moreover, even if Defendant could have legally procured Plaintiff's consumer report, Defendant failed to provide the specific statutory basis for the procurement of the same as required under Civ. C. §1785.20.5.

### **III. THE LITIGATION AND SETTLEMENT OF THE ACTION**

#### **A. Federal FCRA Claims**

Under the FCRA, employers can freely procure and use employment background check reports provided that they follow two strict procedural requirements. First, the consumer must be notified by clear, conspicuous, and stand-alone disclosure informing the applicant that a consumer report for employment purposes will be procured. 15 U.S.C. §1681b(b)(2). Plaintiff alleges that Defendant's disclosures were neither, clear, nor stand-alone as they contained extraneous information and were made as part of the employment application. *See Fok Decl., Ex. 4., P.3-7; Milbourne v. JRK Residential Am. LLC*, 92 F. Supp. 3d 425, 433. (E.D. Va. 2015) (the notices must contain only the mandated disclosures and nothing else);

---

<sup>2</sup> Plaintiff was previously convicted of driving without a license and vandalism. Both convictions occurred during Plaintiff's early twenties and they have been expunged or dismissed pursuant to California Penal Code §1023.4 following the his application with Defendant.

1       *Woods v. Caremark PHC, L.L.C.*, 2015 WL 6742124, at \*2 (W.D. Mo. 2015)  
 2 (finding disclosure to violate the FCRA when it contained an overbroad authorization  
 3 and state-specific notices).

4       Moreover, whenever adverse action is contemplated in whole or in part on the  
 5 basis of information disclosed in a consumer report, the employer must provide the  
 6 consumer with a copy of his report and a notice of rights under the FCRA that is  
 7 compliant with 15 U.S.C. §1681b(b)(3)(A). The notice mandated under this  
 8 requirement is commonly referred to as “pre-adverse action notice.” The idea behind  
 9 this notice is to allow the consumer an opportunity to review and dispute information  
 10 in his/her consumer report before the employment opportunity is lost. *See Reardon v.*  
 11 *ClosetMaid*, 2013 U.S.Dist.LEXIS 169821, \*43 (W.D. Pa. Dec. 2, 2013) (“*Reardon*”)  
 12 citing H.R. Rep. 103-486 at 40 (1994). Here, Defendant failed to provide Plaintiff  
 13 with a copy of his report prior to the revocation of his employment offer. It was not  
 14 until Plaintiff’s counsel made a formal request for the information was a copy of the  
 15 report ultimately provided to Plaintiff. No opportunity was given to Plaintiff to  
 16 dispute the information in his consumer report.

17       Remedies for violation of the FCRA is specified under 15 U.S.C. §§1681n and  
 18 o. Statutory penalties of \$100 to \$1,000 is authorized for each willful and/or reckless  
 19 violation of any provisions of the FCRA. 15 U.S.C. §1681n(a)(1)(A). The aggrieved  
 20 consumer may also recover actual damages, if any for the same.

21  
 22       **B. California CCRRA and Labor Code Claims**

23  
 24       In 2011, AB22 was introduced to amend Lab. C. §1024.5 and add Cal. Civ. C.  
 25 §1785.20.5 to the CCRAA with the intent to generally prohibit the use of consumer  
 26 credit reports for employment purposes. The California legislature found that “a  
 27 person’s credit score says nothing about his or her character or ability to do a job  
 28 effectively and responsibly.” AB22, September 1, 2011, P. 3. The law became

1 effective on January 1, 2013. However, a consumer credit report was nevertheless  
 2 procured on Plaintiff.

3 Under Lab. C. §1024.5(a)(1)-(8), there are several exceptions to the prohibition  
 4 against procurement of credit reports. These exceptions relate to employment  
 5 positions within financial institutions and positions where the applicant has access to  
 6 sensitive consumer financial information. None of these exceptions apply to  
 7 Plaintiff's position of a medical assistant.

8 Moreover, even where a position falls within the enumerated exception, the a  
 9 notice compliant with Civ. C. §1785.20.5 (specifying the applicable exception) must  
 10 be provided to the consumer *before* a credit report may be procured. Plaintiff alleges  
 11 that Defendant categorically failed to provide such notice to any California job  
 12 applicants for whom Defendant procured a credit report. Accordingly, Plaintiff  
 13 believes that this action is suitable for class determination.

14 Violation Lab. C. §1024.5 may be enforced through the PAGA, with one a  
 15 one-year limitations period. Code of Civ. Pro. §340(a). A civil penalty of \$100 per  
 16 violation is authorized for each aggrieved employee. Lab. C. §2699(f)(2). The  
 17 CCRAA has a 2-year statute of limitations. Civ. C. 1785.33. It authorizes consumers  
 18 to recover \$100-\$2,500 in civil penalties for willful and/or reckless violations as well  
 19 as actual damages.

### 20           21       C. Settlement Class

22           23       The settlement class involves four subclasses. A settlement class member may  
 24 belong to one or all of these subclasses and his or her recovery will be increased as  
 25 further discussed below:

- 26           27       • ***FCRA Disclosure Subclass*** (15 U.S.C. §1681b(b)(2)(A)(i)) – All  
 28           individuals who: (1) applied for employment with Defendant between  
                  July 27, 2013 to October 24, 2016 or the date the Court grants

1 preliminary approval, whichever is later; (2) executed a disclosure and  
 2 authorization form substantially identical to that executed by Plaintiff;  
 3 and (3) had a “consumer report” prepared within the meaning of the  
 4 FCRA, which was procured by Defendant.

- 5 • ***FCRA Notice Subclass*** (15 U.S.C. §1681b(b)(3)(A)(i)) – All FCRA  
 6 Disclosure Class Members who: (1) had their employment offers  
 7 rescinded due to a consumer report procured by Defendant; and (2)  
 8 allegedly did not receive a pre-adverse action notice before the  
 9 employment offers were rescinded.
- 10 • ***CCRAA Subclass*** (Civ. C. §1785.20.5) – All FCRA Disclosure Class  
 11 Members who: (1) had a “consumer credit report” prepared on them  
 12 within the meaning of the CCRAA, which was procured by Defendant;  
 13 and (2) resided in California at the time the consumer credit report was  
 14 procured by Defendant.
- 15 • ***PAGA Subclass*** (Lab. C. §1024.5) – All FCRA Disclosure Class  
 16 Members who: (1) applied for employment with USHW on or after June  
 17 24, 2014; (2) executed a disclosure and authorization form substantially  
 18 identical to that executed by Plaintiff; (3) had a “consumer credit report”  
 19 prepared on them within the meaning of the CCRAA, which was  
 20 procured by Defendant; and (5) applied for positions which may not  
 21 have fallen within one of the eight (8) categories enumerated in  
 22 California Labor Code §1024.5.

23 SA, P. 5, ¶I.1.27.

24

25 **D. Discovery**

26

27 Prior to the mediation on May 17, 2016, Plaintiff served on Defendant an  
 28 extensive informal discovery requests. In response, Defendant produced a class list

1 detailing all consumers (name withheld, but uniquely identified through a consumer  
 2 report order ID number) for whom they procured a consumer report.

3 As of May 17, 2016, Defendant procured 3,382 consumer reports. Of those, 33  
 4 (.975%) failed their background checks or were not hired. This included 502  
 5 (14.84%) California applicants on whom Defendant procured a credit report. Plaintiff  
 6 obtained the job title and descriptions of these 502 applicants and determined that  
 7 none of them fell within the exceptions enumerated under Lab. C. 1024.5(a)(1)-(8).  
 8 Of the 502 California job applicants, 375 fell within the 1-year Private Attorney  
 9 General's Act's ("PAGA" Lab. C. §2699 *et seq.*) statute of limitations period. Code  
 10 of Civ. Pro. §340(a). The balance fell outside of the 1-year period and is nevertheless  
 11 entitled to recovery under CCRAA's 2-year statute of limitations. Civ. C. 1785.33.  
 12 Since the mediation, the class size has since increased to 4,381 members. The parties  
 13 anticipate that the class size will not exceed 4,500 by the date of the preliminary  
 14 approval.

#### 15

#### 16 **E. The Payment Structure**

17

18 The settlement proceeds will be distributed based on a point system. *See* SA,  
 19 P.18-19, ¶IX.9.6.1. **One (1) point** is assigned to every member of the FCRA  
 20 Disclosure Subclass who did not receive the FCRA mandated disclosure in the form  
 21 mandated under 15 U.S.C. §1681b(b)(2). Every class member will belong to this  
 22 class as they have all signed identical forms before being subject to employment  
 23 background check reports.

24 **Ten (10) points** is assigned to every member of the FCRA Notice SubClass  
 25 who did not receive a copy of the report and a reasonable opportunity to dispute the  
 26 information before their employment offers were revoked.

27 **Five (5)** points is assigned to every member of the CCRAA subclass and **one**  
 28 **(1)** point is assigned to every member of the PAGA SubClass.

1       Based on the parties' calculation, this translates to approximately \$40 per point  
2 based on a class size of 4,381 and before any deductions.

3

4       **F. PAGA Payment**

5

6       Pursuant to the PAGA, the parties agree to allocate, conditioned upon this  
7 court's approval, \$37,500 as penalties to the Labor and Workforce Development  
8 Agency ("LWDA"). Lab. C. §2699(e). This amount is based on the pre-mediation  
9 discovery of 375 applicant who fall within this 1-year PAGA class multiplied by the  
10 statutory penalty of \$100 per applicant. Lab. C. §2699(f)(2).

11

12       **G. Notice and Opt-Out**

13

14       Within 15 days after preliminary approval, Defendant will furnish to the third-  
15 party settlement administrator a class list including the name, most current mailing  
16 address, telephone number, and social security number (to the extent available to  
17 Defendant). SA, P. 10-11, ¶VI.6.1.1. Defendant will also provide the class  
18 membership of each subclass that each of the settlement class members belongs to.

19 *Id.*

20       The address information will be verified by the settlement administrator using  
21 the USPS National Change of Address database. SA, P. 11, ¶VI.6.1.2. Skip-tracing of  
22 the social security number of the class member will be used if no known or valid  
23 mailing address is found. *Id.*

24       Mail notice will be sent 30-days following preliminary approval via first class  
25 U.S. mail, postage prepaid. The proposed notice is attached as Exhibit 1 of the class  
26 settlement agreement.

1 Any settlement class members may opt-out prior to the opt-out deadline  
2 defined as 45-days after the mailing of the settlement notice or 75-days after the date  
3 of preliminary approval. *See* SA, P.4, ¶I.1.19.

4

5 **H. Attorney's Fees and Expenses and a Service Award to the Class**  
6 **Representative**

7

8 The Settlement Agreement provides that Class Counsel may move for the  
9 Court to award attorney's fees, costs and expenses to be paid from the Gross  
10 Settlement Fund. The Fees Award is in an amount not to exceed 33 and 1/3% of the  
11 Settlement Fund or \$133,333.33. SA, P. 15, ¶IV.9.2. This amount is less than the  
12 Plaintiff's counsel's current lodestar.

13 Class Counsel may also petition this Court on behalf of the named Plaintiff an  
14 incentive award in an amount not to exceed \$5,000.00. SA, P. 17, ¶IV.9.3.3.

15

16 **I. Cy Pres Recipient**

17

18 The parties have designated Center for Employment Opportunities ("CEO") as  
19 the *cy pres* recipient. The CEO is a nationwide non-profit organization that is  
20 dedicated to assisting job applicants with a conviction to find jobs. *See*  
21 <http://ceoworks.org/about/what-we-do/mission-vision/>, last viewed September 24,  
22 2016.

23

24 **IV. THE SETTLEMENT CLASS SHOULD BE CERTIFIED**

25

26 Rule 23 allows courts to conditionally or provisionally certify a class for  
27 purposes of effectuating a settlement. *In re General Motors Corp. Pick-Up Truck*  
28 *Fuel Tank Prods. Liability Litig.*, 55 F.3d 768, 793-94 (3rd Cir. 1995); *White v.*

1      *Experian Info. Solutions, Inc.*, 803 F. Supp.2d 1086, 1094 (C.D. Cal. 2011) (“Where,  
 2 as here, ‘the parties reach a settlement agreement prior to class certification, courts  
 3 must peruse the proposed compromise to ratify both the propriety of the certification  
 4 and the fairness of the settlement.’”). To certify a class, the court must find that the  
 5 prerequisites of Rule 23(a) are met, and that the case falls within at least one of the  
 6 categories listed in Rule 23(b). *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1022 (9th  
 7 Cir. 1998); *Legge v. Nextel Communications, Inc.*, CV 02-8676-DSF (VNKX), 2004  
 8 WL 5235587, \*1 (C.D. Cal. June 25, 2004). The same standards generally apply  
 9 where certification is sought for settlement purposes only, although issues of  
 10 manageability at trial are not relevant. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591,  
 11 620 (1997). Both Rule 23(a) and Rule 23(b) are satisfied here.  
 12

13      **A. Rule 23(a) Requirements**

14  
 15      Under Rule 23(a), one or more persons may sue as representative parties on  
 16 behalf of a class if: 1) the class is so numerous that joinder of all members is  
 17 impracticable; 2) there are questions of law or fact common to the class; 3) the claims  
 18 or defenses of the representative parties are typical of the claims or defenses of the  
 19 class; and 4) the representative parties will fairly and adequately protect the interests  
 20 of the class. Fed. R. Civ. P. 23(a).

21  
 22      **a. Numerosity**

23  
 24      A class action can only be maintained where “the class is so numerous that  
 25 joinder of all members is impracticable.” Fed. R. Civ. P. 23(a)(1); *Legge*, 2004 WL  
 26 5235587 at \*4. But “[t]here is no absolute number at which joinder becomes  
 27 impracticable. *Legge*, 2004 WL 5235587 at \*4 (citing *Gen. Tel. Co. v. EEOC*, 446  
 28 U.S. 318, 330, 100 S. Ct. 1698, 64 L.Ed.2d 319 (1980)). Generally, a class size of

1 approximately 40 members has been held to meet the numerosity requirement. *See,*  
 2 *e.g., Jordan v. Los Angeles County*, 669 F.2d 1311, 1319 (9th Cir. 1982), *vacated and*  
 3 *rem'd on other grounds*, 459 U.S. 810 (1982) (“we would be inclined to find the  
 4 numerosity requirement in the present case satisfied solely on the basis of the number  
 5 of ascertained class members, i.e., 39, 64 and 71”); *Ashmus v. Calderon*, 935 F.Supp.  
 6 1048, 1064 (N.D. Cal. 1996) (certifying a class of 52 members). Since there are 4,381  
 7 class members, the numerosity requirement is easily met.

8

9           **b. Commonality**

10

11       Under Rule 23(a)(2), a class must have sufficient commonality, which  
 12 “requires the plaintiff to demonstrate that the class members have suffered the same  
 13 injury.” *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551, 180 L.Ed. 2d 374  
 14 (2011) (quotation omitted). This requirement is construed “permissively.” *Legge*,  
 15 2004 WL 5235587 at \*5 (citing *Hanlon*, 150 F.3d at 1019). Commonality is  
 16 evaluated as to whether the complaint truly “is capable of classwide resolution –  
 17 which means that determination of its truth or falsity will resolve an issue that is  
 18 central to the validity of each one of the claims in one stroke.” *Dukes*, 131 S.Ct. at  
 19 2551.

20        “[C]ommonality is often found in consumer fraud and related actions where  
 21 standardized documents and procedures are used. This is true for violations of FCRA  
 22 and ECOA.” *Legge*, 2004 WL 5235587 at \*5 (citing *Clark v. Experian Info.*  
*Solutions, Inc.*, 2002 U.S.Dist.LEXIS 20410, \*11 (D.S.C. June 26, 2002) common  
 23 questions predominate in FCRA action, including whether a “particular practice or  
 24 policy of writing credit reports” was reasonable.)). Here, every Class member’s claim  
 25 stems from Defendant’s alleged failure to provide them with disclosures and the  
 26 procurement of credit report on California consumers. The notices provided to each  
 27 individual applicant did not vary between applicant to applicant and Defendant

1 uniformly failed to provide any notice under the CCRAA to any of its California  
 2 applicants prior to procuring employment credit reports.

3 Commonality has been found in similar cases including claims for failure to  
 4 provide pre-adverse action notice. *Reardon v. Closetmaid Corp.*, 2011  
 5 U.S.Dist.LEXIS 45373, at \*14 (“Here, there are numerous questions of law or fact  
 6 common to the class. These include, but are not limited to....whether [defendant]  
 7 relied on derogatory information in consumer reports to deny employment to the sub-  
 8 class members in violation of the FCRA...”); *Singleton*, 976 F.Supp.2d at 675  
 9 (finding common question of “whether [defendant] violated the FCRA by failing to  
 10 provide employees with copies of their consumer reports and pre-adverse action  
 11 notice”). See also *Megallon*, *Megallon v. Robert Half Int'l, Inc.*, 2015  
 12 U.S.Dist.LEXIS 153584 (D.Or. 2015) (certifying a class action based on identical  
 13 claims raised in this litigation); *Thomas v. FTS USA, LLC*, 2016 U.S.Dist.LEXIS  
 14 2055 (E.D. Va. 2016); *Milbourne v. JRK Residential Am., LLC*, 2014 U.S. Dist.  
 15 LEXIS 155288 (E.D. Va. 2014); *Manuel v. Wells Fargo Bank, N.A.*, 2015 U.S.  
 16 Dist.LEXIS 109780 (E.D. Va. 2015).

17

18           c. **Typicality**

19

20 For similar reasons, Named Plaintiff’s representative claim satisfies the  
 21 typicality requirement of Rule 23(a)(3). Typicality and commonality are similar and  
 22 tend to merge. *Gen. Tel. Co. of Sw v. Falcon*, 457 U.S. 147, 157 n.13 (1982). “Under  
 23 the rule’s permissive standards, representative claims are ‘typical’ if they are  
 24 reasonably co-extensive with those of absent class members; they need not be  
 25 substantially identical.” *Hanlon*, 150 F.3d at 1020; accord *Legge*, 2004 WL 5235587  
 26 at \*8 (“As a result of the uniformity with which [Defendant] treated its customers, the  
 27 Plaintiffs’ experiences and claims in some ways are typical of those of the class.”). In

28

1 the instant case, Plaintiff contends that each class member suffered the same harm.  
2 Accordingly, Plaintiff's claims are typical of the proposed class.

3

4 **d. Adequacy of Representation**

5

6 To make a determination on adequacy, the Court must evaluate both the  
7 Named Plaintiffs and their counsel:

8

9 Resolution of two questions determines legal adequacy: 1) do the named  
10 plaintiffs and their counsel have any conflicts of interests with other  
11 class members and 2) will the named plaintiffs and their counsel  
prosecute the action vigorously on behalf of the class?

12 *Hanlon*, 150 F.3d at 1020.

13 All factors support certification here. There is no conflict of interest that would  
14 prevent Named Plaintiff or Class Counsel from representing the proposed Class, and  
15 Named Plaintiff and Class Counsel have vigorously pursued the Class's claims. Class  
16 Counsel are experienced class-action litigators who have successfully represented the  
17 Named Plaintiff and putative class in this litigation and settlement negotiations.  
18 Information about the qualifications DHF Law, P.C., and A New Way of Life  
19 Reentry Project are included in the declarations of Devin H. Fok, and Joshua E. Kim  
20 respectively.

21

22 **B. Rule 23(b)(3) Requirements**

23

24 The Settlement contemplates provisional class certification under Rule  
25 23(b)(3). If the elements of Rule 23(a) are satisfied, then a class action may be  
26 certified provided the court finds that certain other requirements under Rule 23(b)(3)  
27 are met: 1) questions of law or fact common to class members predominate over any  
28 questions affecting only individual members, and 2) a class action is superior to other

1 available methods for fairly and efficiently adjudicating the controversy. Fed. R.Civ.  
 2 P. 23(b)(3); *Hanlon*, 150 F.3d at 1022.

3       The “predominance inquiry tests whether proposed classes are sufficiently  
 4 cohesive to warrant adjudication by representation.” *Amchem Prods.*, 521 U.S. at  
 5 623. Predominance is similar to, but “far more demanding” than the commonality  
 6 requirement. *Id.* at 623-24. The predominance requirement is satisfied because  
 7 common questions present a “significant portion of the case” that can be resolved for  
 8 all Class members in a single adjudication. *See Gutierrez v. Wells Fargo Bank, N.A.*,  
 9 2008 W.L. 4279550, \*14 (N.D. Cal. Sept. 11, 2008) (citing *Hanlon*, 150F.3d at 1019-  
 10 22). As discussed in the commonality and typicality sections above, the most central  
 11 issue in this litigation is common among all the prospective Class members and the  
 12 Named Plaintiff. Moreover, it is Plaintiff’s contention that the elements of these  
 13 nearly identical claims could be shown at trial through common evidence regarding  
 14 Defendant’s alleged policies, procedures and practices for sending FCRA and  
 15 CCRAA notices.

16       Additionally, adjudicating the facts presented in this action on a class-wide  
 17 basis would be superior to alternative methods of adjudication. “The superiority  
 18 requirement is generally satisfied where there are ‘multiple claims for relatively small  
 19 individual sums.’” *Legge*, 2004 WL 5235587 at \*12 (quoting *Local Joint Exec. Bd.*  
 20 *Of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1163  
 21 (9th Cir. 2001)). This is because “[w]ithout a class action, the costs of individual  
 22 litigation as compared to the amount of damages may be prohibitively high,” or “the  
 23 individual plaintiffs’ claims are so small that denying class certification would  
 24 effectively preclude any recovery.” *Id.* (recognizing that a class action may not only  
 25 be the superior method of adjudication of multiple claims with small damages, but  
 26 may be the only realistic means for class members to adjudicate their claims).

27       The interests of the Class would not be better served by prosecuting their  
 28 claims individually. *See Fed. R. Civ. P. 23(b)(3)(A)-(B)*. Indeed, a class action is only

1 feasible means by which individual applicants can effectively challenge Defendant's  
 2 conduct, given the relatively modest size of individual claims under the FCRA, which  
 3 provides for statutory damages of only \$100-1,000 per violation<sup>3</sup>, and the vastly  
 4 superior resources with which Defendant has to defend itself. It is therefore desirable  
 5 to litigate the issues in this forum on a class-wide basis. *See id.*, at 23(b)(3)(C).

6

7 **C. The Proposed Settlement More Than Satisfies the Standard for**  
 8 **Preliminary Approval**

9

10 The proposed Settlement Agreement in this case, which provides for a non-  
 11 reversionary monetary recovery of \$400,000 more than meets the standard for  
 12 preliminary approval. On a per-class member basis, this settlement is commensurate  
 13 with settlement of similar FCRA claims. *See Barel v. Bank of Am.*, 255 F.R.D. 393,  
 14 402 (E.D. Pa. 2009) (“The proposed settlement confers \$51.96 of value on each class  
 15 member, which amounts to...52% of the low end of the damages range and 5.2% of

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16

17 <sup>3</sup> While the FCRA does provide for recovery of actual damages, 15 U.S.C. §1681o(a)  
 18 (actual damages for negligent FCRA violation) and 1681n(a) (actual damages for  
 19 willful FCRA violation), such damages may only be sought where the damage is  
 result of the violation at issue. *See Caltabiano v. BSB Bank & Trust Co.*, 387  
 20 F.Supp.2d 135 (E.D.N.Y. 2005) (debtor suing credit agencies unable to recover actual  
 damages where loan-rate increase was based on market rate rather than credit report).  
 21 Class members who perceive they have actual damages as a result of failing to  
 receive pre-adverse action notice may opt-out of the Settlement. This ability to opt-  
 22 out has been held to sufficiently protect those class members in similar cases. *See*  
*Egge v. Healthspan Services Co.*, 208 F.R.D. 265, 272 (D. Minn. 2002)  
 23 (“[defendant’s] alleged concern that individual class members may be able to recover  
 more in individual actions is adequately addressed by use of the Rule 23(b)(3) opt-out  
 24 procedure.”) (quotation omitted); *Macarz v. Transworld Systems, Inc.*, 193 F.R.D.46,  
 25 55 (D. Conn. 2000); *Weber v. Goodman*, 9 F.Supp.2d 163,170, 171 (E.D.N.Y. 1998)  
 26 (deciding a class action in an FDCPA case where individual claims could hve  
 resulted in recoveries of \$1,000 per individual was superior even though the class  
 27 members would receive no more than \$2 in statutory damages for the defendant’s  
 FDCPA violation).

1 the high end of the damages range"); *Singleton v. Domino's Pizza, LLC*, 976  
 2 F.Supp.2d 665 (D. Md. 2013) (\$2.5 million FCRA settlement for a claim-in class of  
 3 45,668 potential class members); *Hunter v. First Transit, Inc.*, 09-cv-6178 \* 10-cv-  
 4 7002 (N.D. Ill. Mar. 23, 2011) (\$5.9 million FCRA settlement for more than 143,000  
 5 class members); *Brown et al. v. Lowe's Companies, Inc., et al.*, 5:13-cv-00079-RLV-  
 6 DSC (W.D. N.C. 2016) (FCRA settlement, \$35 cash or \$50 gift card per class  
 7 member); *Johnson v. Midwest Logistics Sys.*, 2013 U.S.Dist.LEXIS 74201 (S.D. Oh.  
 8 2013) (\$452,380 common fund with \$260 for each consumer who has been subject to  
 9 an adverse consumer report; and \$1,000 for each consumer who has been subject to  
 10 an adverse consumer report; and was not hired); Cf *Harris v. U.S. Physical Therapy, Inc.*, 2012 U.S.Dist.LEXIS 111844 (D.Nv. 2012) (\$1,000 each class member for 47-  
 11 members of the proposed pre-adverse action notice class); *Townsend v. AIM Integrated Logistics, Inc.*, 4:15-cv-00493-KBB (N.D. Oh. 2015) (automatic payment  
 12 of \$1,000 for 206 class members who were not provided pre-adverse action notice);  
 13 *Reardon v. ClosetMaid*, 2:08-cv-01730-MRH, 2013 U.S.Dist.LEXIS 169821 (W.D.  
 14 Pa. 2013) (\$400 to approximately 50 pre-adverse action notice class members after  
 15 the court granted class certification as to these members).

16 Plaintiff is not aware of any similar PAGA and/or CCRAA settlements of  
 17 similar as the statute was enacted relatively recently, the above FCRA cases with  
 18 similar statutory penalty provisions demonstrate that the settlement amount reached  
 19 in this action is well within what courts have found to be fair and reasonable.

20

21

22

23       a. **The Settlement Is the Product of Serious, Informed, Non-**  
 24           **Collusive Negotiations**

25

26       As recounted above, the settlement in this case was reached only after  
 27 extensive formal discovery and after the filing of a formal motion for class  
 28 certification. This is clear indicia that the settlement was the result of an arm's length

negotiation. "An "initial presumption of fairness is usually involved if the settlement is recommended by class counsel after arm's-length bargaining." *Riker v. Gibbons*, 2010 WL 4366012, at \*2 (D. Nev. Oct. 28, 2010); *see also Hanlon*, 150 F.3d at 1027 (affirming approval of settlement after finding "no evidence to suggest that the settlement was negotiated in haste or in the absence of information illuminating the value of plaintiff's claims.").

#### **b. The Settlement Is Adequate and Reasonable**

While the exact amount that each class member will recover is unknown until all checks have been cashed, the gross settlement amount of \$400,000 is substantial.

For a vast majority of the consumers, the compensation is fair for any and alleged harm that they have suffered due to not receiving notice in the method and manner mandated by the FCRA. The settlement also fairly and adequately compensates California class members who have been subject to credit reports. As fully set forth above, less than 1% of the applicants (33 of 3,382) were denied employment for due to information in their employment background check reports, this means that 99% of the applicants did not suffer any actual damages outside of the statutory penalties authorized under the respective statutes.

Moreover, the statutory penalty of \$100 to \$1,000 for the FCRA and \$100 to \$2,500 for the CCRAA is available only if Plaintiff can establish willful violation. 15 U.S.C. §1681n(a)(1)(A); Civ. C. §1785.31(a)(2)(B). If the Defendant's violation was at most negligent, recovery is limited to actual damages. *See* 15 U.S.C. §1681o(a)(1); Civ. C. §1785.31(a)(1).

Viewed in the context of the litigation risks faced, as well as the substantial delay, and costs that class members would have experienced in order to receive proceeds from an adversarially-obtained judgment, not to mention the judicial

1 resources required, this settlement is in the best interests of the Plaintiff and the  
2 Settlement Class members, and should be approved.

3

4 **D. The Court Should Approve Dissemination of the Proposed Class Notice**

5

6 With this motion, Plaintiffs have provided two forms of proposed class  
7 notice—the short notice to be mailed and the long form notice to be made available  
8 on the settlement website and upon request. Fok Decl., SA, Ex. 1 and 2. These  
9 proposed notices include all of the information required by Fed. R. Civ. P.  
10 23(c)(2)(B). The Long Form Notice contains details about the definition of the Class,  
11 the proposed Class Counsel, the size of the settlement fund, the methodology for  
12 opting out of or objecting to the settlement, the potential size of Plaintiff's request for  
13 attorney's fees, expenses, and class representative incentive awards, and the date and  
14 location of the final approval hearing. This notice program exceeds the requirements  
15 of Fed. R. Civ. P. 23, and should be approved.

16

17 **V. CONCLUSION**

18

19 Based on the foregoing, Plaintiffs respectfully request this Court to grant  
20 approval to the proposed settlement.

21

22 DATED: September 24, 2016

**DHF LAW, P.C.**

23 By: /s/ Devin H. Fok  
24 Devin H. Fok  
25 Attorney for Plaintiff

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## **E-FILING ATTESTATION**

By his signature below, counsel for Plaintiff attests that he has on file all holographic signatures corresponding to any signatures indicated by a conformed signature (/s/) within this e-filed document and any document e-filed concurrently herewith.

DATED: September 24, 2016

DHF LAW, P.C.

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